In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 930

ALBERT P. DICKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On January 18, 1963, the United States initiated this condemnation proceeding in the United States District Court for the District of Columbia. The only issue at trial was the amount of compensation due the former landowners, which the jury fixed at $1,303,594 (Pet. App. 1–2). On petitioners' appeal, the court of appeals affirmed (Pet. App. 1–11; 352 F. 2d 455).

Petitioners seek to raise here broad questions under the discovery provisions of the Federal Rules of Civil Procedure, which the court of appeals properly found unnecessary to reach. Examination of the record re-

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veals that the only question presented is the narrow one whether petitioners were prejudiced by the trial court's ruling on their pre-trial request for stipulations. This issue was correctly resolved by both courts below[1] and does not warrant further review by this Court.

In their pre-trial statement, petitioners requested the following stipulation (J.A. 1):[2]

> (5) That formal appraisal reports of the expert appraisers engaged and who may be used at the trial, by the owners and by the United States of America be exchanged within ten (10) days hereof.

After a pre-trial conference, the district court entered an order including the following provision (J.A. 11):

> 10. Counsel for the Government and counsel for the owners will exchange names of the appraisers which each expects to call as witnesses. Appraisal reports will not be exchanged and no additional discovery pertaining to these expert witnesses will be allowed.

The record does not disclose, and we are not aware, that petitioners took any further steps to obtain discovery of appraisal reports made on their property until they filed their second motion for a new trial on August 25, 1964 (J.A. 604–610), more than four months after the entry of judgment. This motion was based on petitioners' alleged "discovery" of "new evidence"; *i.e.*, that the appraisals of their property

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[1] The question of the effect of the district court's pre-trial order was raised in that court by petitioners' second motion for a new trial.

[2] "J.A." refers to the Joint Appendix filed in the court below.

made by William S. Harps and Arthur M. Fisher, who had been employed by the government but whose reports were not used at trial, were higher than the appraisals submitted by the two government-employed appraisers who did testify at trial. The government's response to this motion showed (J.A. 618–622), and petitioners concede (Pet. 7, n. 1), that petitioners were aware, long before trial, that Harps and Fisher had been retained by the government to appraise their property. Petitioners were also aware, once the government submitted the names of the experts it expected to call, that the government did not intend to use Harps or Fisher at trial.

Petitioners contend that it was error for the court to refuse to permit them to examine Harps's and Fisher's appraisal reports in advance of trial. The record discloses, however, that petitioners did not request such discovery and that the court did not deny it. Petitioners made no attempt to take the deposition of any government appraiser under Rules 30 or 31; nor did they move, "showing good cause therefor," for the production of documents under Rule 34. Petitioners merely made a pre-trial request (*supra*, p. 2) for the exchange of appraisal reports by experts *"engaged and who may be used at the trial"* by the parties [emphasis added]. Presumably, had this request been granted, petitioners themselves would not have been required to produce the appraisal report of Fred Babcock, whom, we are informed (see J.A. 617), petitioners retained but chose not to use at trial.

Even if petitioners' request is read to include the reports of appraisers whom neither side intended to

call at trial, the court's order limiting discovery (*supra*, p. 2) is expressly restricted to *"appraisers which each* [*party*] *expects to call as witnesses"* and *"these expert witnesses"* [emphasis added]. This order, in terms, did not prohibit petitioners from taking the depositions of the appraisers whom the government did not choose to call as witnesses. As the court of appeals observed (Pet. App. 5), "Appellants had ample opportunity to take whatever steps they deemed in their interest to *explore* [*Harp's and Fisher's*] *views* and to call them as witnesses if they chose" [emphasis added].[3] Having failed to avail themselves of this opportunity, petitioners cannot now claim to have been disadvantaged.

Assuming *arguendo* that petitioners had sought, and the court denied, discovery of the appraisals made by Harps and Fisher, petitioners have not been prejudiced. Petitioners do not, and cannot, claim that the absence of pre-trial discovery of government appraisers' reports in any way impaired their ability to obtain factual material bearing on the value of their property. Indeed, they make no attempt to show that the denial of discovery as to the experts whom the government did call to the stand affected their interests in any way. Instead they assert, in effect, only that denial of discovery from Harps and Fisher prevented them from making an intelligent decision whether to call these appraisers—whom they knew the government had employed—on their own behalf. As we have shown (see *supra*, pp. 3–4), however, peti-

[3] The significant phrase which we have italicized is wholly omitted from petitioners' quotation of this portion of the court's opinion (Pet. 13).

tioners had ample opportunity to obtain the information necessary for this trial decision. Moreover, as the court of appeals pointed out (Pet. App. 5), "Any testimony that Harps and Fisher might have given would have been cumulative only."[4] In any event, there is nothing in the record to show that petitioners had "good cause" to require the production of the appraisers' reports from the government—a prerequisite for such production under Rule 34.[5]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Petitioners assert, without citing authority (Pet. 15), that, but for the court's pre-trial order, they could have shown that the government employed and then failed to use Harps and Fisher. Even if this information were admissible in the circumstances of this case, petitioners have not shown how they were precluded from making use of this information by the court's order.

[5] If petitioners' request for a stipulation (*supra*, p. 2) is to be treated as within the discovery provisions of the Federal Rules, it is most appropriately considered as a motion for the production of documents under Rule 34. Even when discovery of the opinions of opposing experts is sought under other rules, it has been suggested that no discovery should be allowed in the absence of a showing of good cause. See, *e.g.*, 2A Barron & Holtzoff, *Federal Practice and Procedure* (Wright ed. 1961) § 652.5, pp. 154–157; 4 Moore, *Federal Practice* (2d ed. 1963) § 26.24, p. 1531.

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